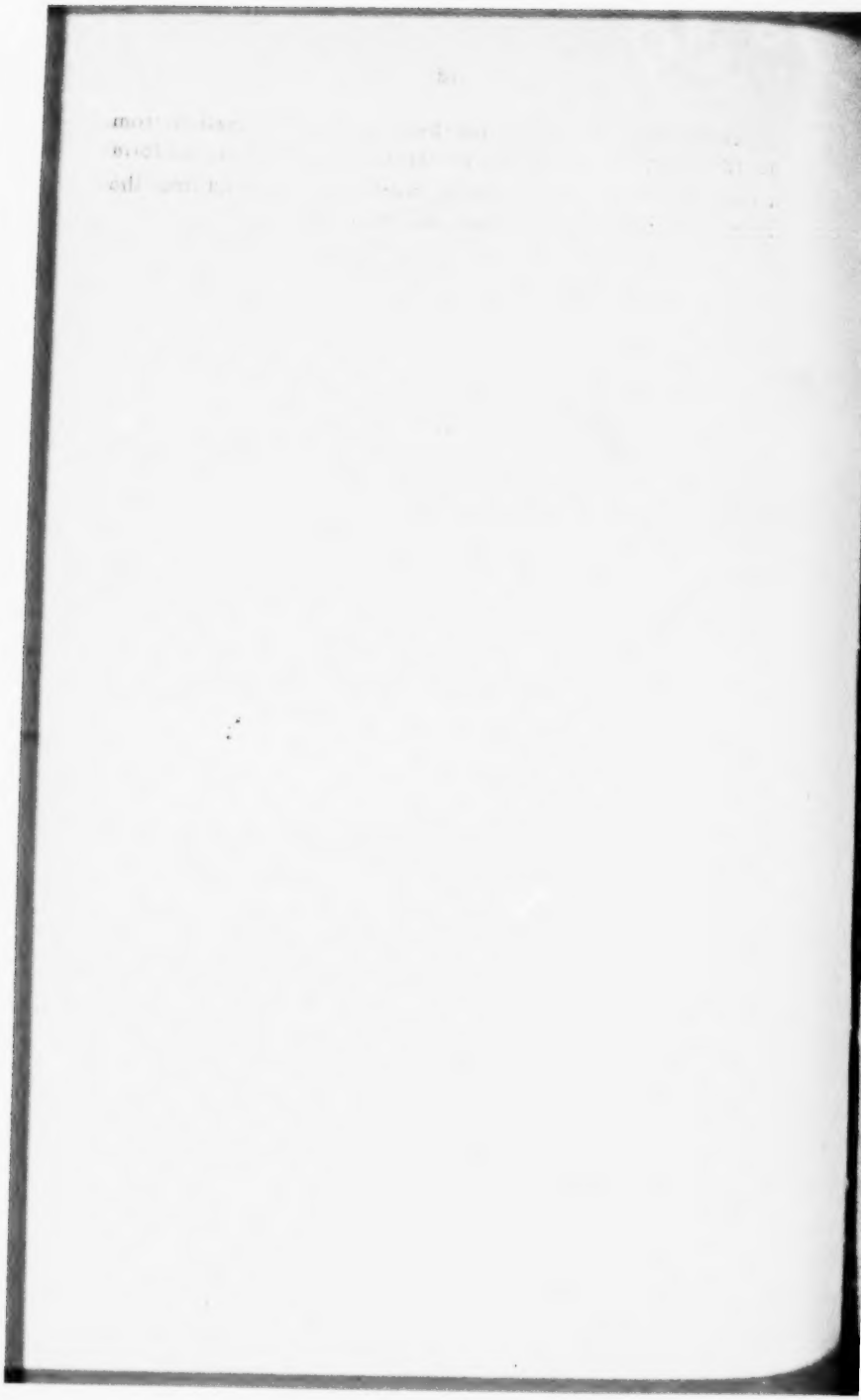

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No. 39.

Filed 1895.

Supreme Court of the United States.

WILLIAM W. BRAUER ET AL.

against

COMPANHIA DE NAVEGACION LA FLECHA.

MEMORANDUM IN OPPOSITION TO MOTION FOR WRIT OF CERTIORARI.

MACFARLAND & PARKIN,
Proctors for Libellants.

W. W. MACFARLAND,
Of Counsel.

The Evening Post Job Printing House, New York.

Supreme Court of the United States.

WILLIAM W. BRAUER *et al.*

AGAINST

COMPANHIA DE NAVEGACION LA FLECHA.

MEMORANDUM IN OPPOSITION TO MOTION FOR WRIT OF CERTIORARI.

An application is made by the respondents for a writ of *certiorari* to the Circuit Court of Appeals to remove the record in the above entitled cause to this Court.

The suit is one in admiralty to recover for the loss of 126 cattle out of a total shipment of 165. The cattle were shipped in New York in October, 1891, by W. W. Brauer & Co., cattle dealers, of Richmond, Va. A storm was encountered and 126 of the cattle were thrown overboard. The libellants claimed that the cattle were alive and were unnecessarily sacrificed through fear on the part of the captain, and through bad management of his vessel. The respondents contended that in the storm nearly all the cattle were killed and maimed, and were thrown overboard because they had become worthless. Much testimony was taken. The Judge of the District Court decided that some at least were unnecessarily

sacrificed, and a reference was ordered (Record, fol. 750 *et seq*).

The Commissioner reviewed the whole testimony on the trial, and the further testimony before him, and awarded damages for one-half the cattle (Record, fol. 884 *et seq.*). Exceptions were filed by both parties. The report was modified as to some small items of expense, but confirmed as to the number of cattle for which the respondents should be held liable (Record, fol. 966 *et seq.*). Both parties appealed from the decree, but it was affirmed.

It is not believed that this Court will remove the record for the purpose of reviewing the question of fact as to which the District Court and Circuit Court of Appeals are in accord. However, as an examination of the facts is invited by the petitioner, we send herewith a copy of our brief in the Circuit Court of Appeals.

The petitioner claims, however, that there are certain propositions of law involved which should be passed upon by the Court.

I.—The petitioner claims that it is not liable for the voluntary destruction of the cattle, because under a provision of the bill of lading they were carried "on deck at owner's risk." The proposition is that not only did this provision protect the petitioner from sea perils, peculiar to carriage on deck; it went further and *gave the master a license to destroy cattle so carried without just cause.* Such, they say, is the interpretation of this provision; such the intention of the parties. It is obviously impossible to treat such a proposition seriously. Of course with the same force it might be argued that the mortality clause excused a wanton killing of the cattle.

It is hardly necessary to say that Benton & Co. *v.* English & Co., L. R., 12 Q. B. Div., 218, has no

bearing. In that case cargo was "necessarily jettisoned to save the ship and the rest of the cargo." It was held that the words "at merchant's risk" did not exclude the right of the charterers to general average contribution. Moreover, we do not assent to the proposition that English law as exhibited in English decisions would not afford relief in such a case as this.

II.—The petitioner further claims that English law would not have given relief upon the facts in this case; that English law was imported into the contract, and should have been taken as the rule of decision.

(1.) The contract was made in New York between a citizen of the United States and a Spanish corporation for carriage of cattle from New York to Liverpool. The contract must therefore be governed by the law of the United States unless the clause referring it to English law is of force, and the law of the United States holds any clause exempting the carrier from liability for the negligence or misconduct of the master to be void as against public policy.

Liverpool S. S. Co. *v.* Phenix Ins. Co., 129 U. S., 397.

(2.) The provision that the contract should be governed by English law was not printed on the original bill of lading, but was stamped with a rubber stamp in type so small and indistinct that it was with difficulty found and read by the Judge on the trial. No assent to the clause on the part of the shipper can in such case be presumed.

Blossom *v.* Dodd, 43 N. Y., 264.
Madan *v.* Sherard, 73 N. Y., 330.
Perry *v.* Thompson, 98 Mass., 249.

The original bill of lading is submitted with this brief for inspection by this Court.

(3.) The clause is found only in the bill of lading. It did not form part of the original contract of affreightment.

Record, fols. 689 *et seq.*

The only reference to the bill of lading is in that clause of the contract which reads "the line form of live stock bill of lading to be used * * * and its conditions to govern any questions *not provided herein*" (fol. 696). The contract provided for the transportation of "about 165 live cattle on the upper deck" (fol. 690). "The shipper assumes all risk of mortality or accident, however caused, throughout the voyage." The contract undertakes to deal with the risk assumed by the shipper, and is not one of the "questions not provided therein." The English law, therefore, was not imported into the contract so far as the risk assumed by the shipper was concerned, and did not vary the extent of that risk as defined by the contract of affreightment and the law of the United States interpreting its provisions.

(4.) Any reference, however, to English law cannot be held to exempt the carrier in such a case from liability for his own negligence.

We do not take our rules of public policy from other countries, nor is it open to contracting parties to bring foreign rules here and make them grounds of decision in our own courts by stipulation in their contracts. Our courts will not enforce a contract which is against our public policy, even if made in another country and valid by its laws.

Oscanyon *v.* Arms Co., 103 U. S., 261.
Rouissilon *v.* Rouissilon, L. R., 14 Ch. Div., 351.

It could not make valid the clause exempting the carrier from liability for negligence to say in ex-

press terms that it should be deemed valid and enforced by any court before which it came, and to refer the contract for its interpretation and effect to the law of another country is simply to say the same thing in another form.

The Iowa, 50 Fed. Rep., 561.
The Energia, 56 Fed. Rep., 124.

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